

In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 06-168V

Originally Issued: November 28, 2007

Reissued: December 7, 2007¹

To be Published

DEBRA ANN ANDERSON, *

*

Petitioner, *

*

v. *

Attorney’s fees and costs;
compensation for administrative tasks;
no reimbursement for conferring with
outside counsel

SECRETARY OF THE DEPARTMENT *

OF HEALTH AND HUMAN SERVICES, *

*

Respondent. *

*

Timothy Litka, Washington, DC, for petitioner.

Michael P. Milmo, Washington, DC, for respondent.

MILLMAN, Special Master

DECISION AWARDING ATTORNEY’S FEES AND COSTS²

On March 1, 2006, Debra Ann Anderson (“petitioner”) filed a petition for compensation pro se under the National Childhood Vaccine Act, 42 U.S.C. § 300aa-10 et seq., alleging that a flu vaccination she received on October 24, 2005 caused her arm pain within one day. Petitioner

¹ On December 5, 2007, respondent filed a Motion to Publish under General Order #10. The undersigned grants respondent’s Motion.

² Vaccine Rule 18(b) states that all decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would clearly be an unwarranted invasion of privacy. When such a decision or designated substantive order is filed, petitioner has 14 days to identify and move to delete such information prior to the document’s disclosure. If the special master, upon review, agrees that the identified material fits within the banned categories listed above, the special master shall delete such material from public access.

offered no evidence of causation except her own assertions, and on October 13, 2006 the undersigned dismissed her petition.

On October 27, 2006, petitioner filed a motion for review pro se. On March 29, 2007, Mr. Timothy Litka became petitioner's attorney of record. On August 27, 2007, Judge Francis M. Allegra issued an opinion affirming the undersigned's ruling.

On September 26, 2007, petitioner filed an Application for Attorney's Fees and Costs ("P.App.") requesting \$6,711.37 for attorney's fees and \$2,486.41 for costs. On October 19, 2007, respondent filed a response to petitioner's Application for Attorneys' Fees and Costs ("R.Resp.") and raised several objections. On November 1, 2007, petitioner filed a Reply to Respondent's Response ("P.Reply") in which she requested an additional \$333.32 in attorney's fees for reviewing and responding to respondent's objections.

I. ATTORNEY'S FEES

The Vaccine Act provides that the special master shall award attorney's fees and costs incurred during the proceedings so long as they are *reasonable*. Barnes v. Sec'y of Dep't of Health and Human Servs., No. 90-1101V, 1999 WL 797468, at *2 (Fed.Cl.Spec.Mstr. Sep. 17, 1999) (emphasis added). "The initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended during litigation and the reasonable hourly rate." Blum v. Stenson, 465 U.S. 886, 888 (1984). It is within the court's discretion to make adjustments if "a fee charged is out of line with the nature of services rendered." Barnes, 1999 WL 797468, at *2, citing Pierce v. Underwood, 487 U.S. 552, 581 (1988) (Brennan, J., concurring).

To determine the number of hours reasonably expended, the court must "exclude from a

fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice is ethically obligated to exclude such hours from his fee submission.” Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). A “special master is given reasonably broad discretion when calculating [attorney’s fees and costs].” Wasson v. Sec’y of Dep’t of Health and Human Servs., 24 Cl. Ct. 482, 483 (1991), aff’d, 988 F.2d 131 (Fed. Cir. 1993). In the absence of sufficient proof, “the special master may rely upon both her own general experience and her understanding of the issues raised.” *Id.*

Administrative tasks

Included in counsel’s invoice for administrative tasks are thirty minutes for going to court to see if the court granted his motions on March 29, 2007, thirty minutes each for two mailings to petitioner on March 31 and August 8, 2007, three hours and forty minutes for filing paperwork on March 27, April 4, May 24, and May 30, 2007, and a total of three hours for services related to going to the post office to mail copies of paperwork to petitioner and respondent’s counsel. P.App. at 8. Petitioner’s counsel’s bill for these services is \$100 an hour, which represents half his normal fee. *Id.* Respondent objects to counsel’s billing for these administrative services because they are not attorney tasks, and he has not adequately justified them. R.Resp. at 2. Petitioner responds that, had a paralegal performed these tasks, they would be compensable. Petitioner’s counsel did not employ a paralegal and therefore requests that the undersigned decide reasonable compensation for the time expended on these tasks. P.Reply at 1.

Upon review of petitioner’s application for fees and costs, the undersigned holds that the administrative tasks for which counsel has billed an hourly rate of \$100 would have been more suitably handled by a secretary. These tasks include filing paperwork, mailing material to

petitioner, and traveling to the courthouse to file motions³. Although counsel may perform these tasks himself, he cannot be reimbursed because, had a secretary performed them, filing and mailing are considered overhead expenses. See, e.g., Macrelli v. Sec’y of Dep’t of Health and Human Servs., No. 98-103V, 2002 WL 229811 , at *7 (Fed.Cl.Spec.Mstr. Jan. 30, 2002) (stating that “time spent performing secretarial tasks is to be subsumed in the overhead costs of practicing law and is not reimbursable”); Isom v. Sec’y of Dep’t of Health and Human Servs., No. 94-770V, 2001 WL 101459, at *2 (Fed.Cl.Spec.Mstr. Jan. 17, 2001) (agreeing with respondent that tasks such as filing and photocopying are subsumed under overhead expenses).

Petitioner’s counsel is, however, entitled to reimbursement for mailing costs. Therefore, petitioner’s counsel may be reimbursed for the postage that he paid to mail copies of documents to his client and respondent’s counsel which total \$44.87. Counsel will not be compensated for the secretarial/administrative tasks. This amounts to a reduction of counsel’s fee request by \$866.66.

Counsel’s time spent conferring with other attorneys

Petitioner’s counsel billed two hours and ten minutes at an hourly rate of \$200 for discussing the case with outside counsel, namely Renée Gentry and Clifford Shoemaker. P.App. at 5-7, P.Reply at 4. Respondent objects to counsel’s billing for the time he spent conferring with other Vaccine Program attorneys because counsel has not provided an explanation for why that time should be compensable. R.Resp. at 2-3. Petitioner’s counsel argues that he is “entitled

³ On March 29, 2007, petitioner’s counsel billed half an hour to travel to the courthouse to see if the court granted his motions and billed \$50.00. Not only is this an unreimbursable administrative task, but petitioner’s counsel has also not justified why it was reasonable to travel to the courthouse. Petitioner’s counsel could have phoned the judge’s clerk, used the electronic PACER system, or waited for the Orders to arrive in the mail.

to consult with any outside counsel of his choosing and it is not respondent's prerogative to dictate these choices." P.Reply at 1. Additionally, counsel notes that this is his first case in the Vaccine Program and he spoke with outside counsel who are very familiar with the Program about specific matters concerning the case. *Id.*

While it is true that petitioner's counsel may consult with outside counsel due to his inexperience in the Vaccine Program, it does not follow that he should be compensated for this time. It is unethical for an inexperienced attorney to bill his client "to learn about an area of the law in which he is unfamiliar." Carter v. Sec'y of Dep't of Health and Human Servs., No. 04-1500V, 2007 WL 2241877, at *5 (Fed.Cl.Spec.Mstr. July 13, 2007). Similarly, an inexperienced attorney may not bill the Vaccine Program for this time either. *Id.* Therefore, the two hours and ten minutes (\$433.33) that petitioner's counsel billed for consulting with Ms. Gentry and Mr. Shoemaker shall not be compensated.⁴

Other time billed

The undersigned notes that there are several entries in which counsel bills two hours or more for preparing simple motions consisting of a few sentences. For example, counsel has billed two hours for reviewing the Vaccine Rules and preparing a "notice of appearance". P.App. at 5. Then, several days later, counsel billed another hour after being informed that he needed to file a Motion to Substitute Counsel. *Id.* Thus, in total, petitioner's counsel charged \$600 to prepare and file a motion to substitute counsel. The undersigned finds this unreasonable and excessive and will grant only one hour of attorney time for this task.

⁴It is unclear how much time petitioner's counsel spent consulting with Ms. Gentry on April 12, 2007 because it is included in his time working on the motion for review. Based upon other entries in which petitioner's counsel consulted outside counsel, the undersigned has subtracted ten minutes from the total 150 minutes for the task.

Additionally, counsel charged two hours for drafting a motion for an extension of time. *Id.* The undersigned does not understand why it would take this much time to draft a motion consisting of five sentences. Again, the undersigned finds this amount excessive and unreasonable and will grant only half an hour at the hourly rate of \$200.

In total, therefore, petitioner's counsel is entitled to \$5044.70. This amount is equal to \$6711.37 from petitioner's original application for fees and costs plus \$333.32 for the time petitioner billed for responding to respondent's objections minus the fees and costs that are not compensable: (1) \$866.66 for administrative tasks, (2) \$433.33 for fees related to consulting with outside counsel, and (3) \$700 for unreasonable and excessive time billed for drafting simple motions.

II. PETITIONER'S COSTS

Petitioner requests a total of \$2,486.41 for out-of-pocket expenses. These expenses include \$1,511.04 for co-payments, \$15 for photocopying costs, \$807.68 for eight days of missed work during the case, \$39.22 for prescription co-payments, \$33.53 for postage, \$32.00 for gasoline, \$5.99 for a phone card, \$35.96 for Advil, and \$5.99 for a hot and cold pack. P.App. at 14. Respondent argues that the insurance co-payments, prescription expenses (including over-the-counter remedies such as Advil and a hot and cold pack), and lost wages are not compensable as litigation expenses. R.Resp. at 1. The undersigned agrees with respondent and does not find these costs to be compensable under the Act. Accordingly, \$2,399.89 shall be deducted from the total costs requested. Petitioner is awarded \$86.52 in costs associated with this litigation.

III. CONCLUSION

Based on the reasons presented above and the court's reductions in fees and costs, a reasonable award in this case is \$5,131.22. Accordingly, the undersigned finds that petitioner's counsel, Mr. Timothy Litka, is entitled to \$5,044.70 in attorney's fees and costs and petitioner is entitled to \$86.52 in costs. In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment herewith.⁵

IT IS SO ORDERED.

Dated: December 7, 2007

/s/ Laura D. Millman
Laura D. Millman
Special Master

⁵ Pursuant to Vaccine Rule 11(a), entry of judgment can be expedited by each party's filing a notice renouncing the right to seek review.